



## United States Department of the Interior

### FISH AND WILDLIFE SERVICE

646 Cajundome Blvd.

Suite 400

Lafayette, Louisiana 70506

January 24, 2018

Mr. William K. Honker  
 Director, Water Division  
 U.S. Environmental Protection Agency, Region 6  
 1445 Ross Avenue, Suite 1200  
 Dallas, TX 75202-2733

Dear Mr. Honker:

The U.S. Fish and Wildlife Service (Service) received your letter dated October 27, 2017, with the enclosed "*Biological Evaluation of the Revised Louisiana Water Quality Standards, DO Criteria for Eastern Lower Mississippi River Alluvial Plains Ecoregion (LAC 33:IX:1123) (Rule WQ091)*" (BE). The BE provided information about amendments to Louisiana's water quality standards involving changes to the dissolved oxygen (DO) criteria for 31 inland freshwater and estuarine stream segments within the eastern Lower Mississippi River Alluvial Plains Ecoregion (eLMRAP) (the Action). The amendments revise the previous year-round DO standard of 5.0 mg/L in inland waters and 4.0 in estuarine waters in the eLMRAP area to 2.3 mg/L during March–November. The BE provided EPA's assessment of potential effects of this Action on species protected under the Endangered Species Act (ESA). Your letter requested Service concurrence under the optional informal consultation process at 50 CFR §402.13 with your determinations that the action is not likely to adversely affect the Alabama heelsplitter, the Atlantic sturgeon (Gulf subspecies), the pallid sturgeon, and designated critical habitat for the Atlantic sturgeon. This letter is the Service's response to your request.

Under Section 7(a)(2) of the ESA and its implementing regulations at 50 CFR §402, a federal agency is required to ensure that any discretionary action it approves, funds, or implements is not likely to jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of critical habitat. Taking of listed animal species that occurs incidental to such Federal actions may obtain an exemption from the ESA take prohibitions through the Section 7 consultation process. Because EPA approved the revised DO criteria on June 3, 2016, it appears that the EPA has already exercised its discretionary involvement in or control over this action. With the sole exception of emergency response actions, interagency consultation under Section 7 of the ESA applies to proposed actions. The Service has no authority to conduct consultation on non-emergency actions that are already concluded. Likewise, the Service has no authority to exempt the taking of listed animal species that has already occurred.

We note the BE (page 4) states that EPA approval of the revised DO criteria is “subject to the results of consultation,” and that EPA “retains authority to take additional action regarding Louisiana’s recently revised criteria if consultation identifies deficiencies in those criteria.” However, the prospective consultation process evaluates a *proposed* Federal action relative to the requirements of Section 7(a)(2). Please recognize that the Service has no authority under the ESA to identify or remedy deficiencies in another Federal agency’s action after-the-fact other than to prosecute violations of the taking prohibitions.

Although we are unable to consult with EPA on the prior approval of the revised DO criteria, we can provide technical assistance about the conservation of listed species found within waters of the eLMRAP area. We believe the BE did not evaluate how listed species individuals and relevant physical and biological features of designated critical habitat are reasonably certain to respond to exposure to water quality conditions as specified under the revised criteria; i.e., DO levels of 2.3 mg/L throughout the eLMRAP area from March–November. We believe the Action may allow subsequent State actions that may cause adverse effects to the Alabama heelsplitter within stream segment 040306 of the Amite River and to the Atlantic sturgeon in multiple stream segments within the Lake Pontchartrain Basin.

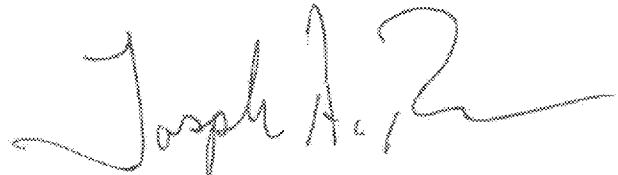
In a November 13, 2017, email addressed to me, you wrote:

“Total Maximum Daily Loads (TMDLs) for the impacted waterbodies will need to be revised by LDEQ [Louisiana Department of Environmental Quality] and approved by EPA before NPDES [National Pollutant and Discharge Elimination System] permits can reflect effluent limitations based on the revised criteria.”

If so, EPA’s prior approval of the revised DO criteria has not yet governed State actions (e.g., new or expanded NPDES permits) that could cause adverse effects to listed species or designated critical habitat. However, the LDEQ permitting website shows that Louisiana Pollutant Discharge Elimination System (LPDES) permits are being issued in eLMRAP stream segments based on compliance with the new water quality standards, which encompass the revised DO criteria. To provide an example, LPDES permit number LAG53000 was issued for a sewage treatment facility in the eLMRAP in November of 2017. Perhaps EPA approval of the proposed TMDL revision may be considered a new Federal action that would address, through consultation, the potential adverse effects of the revised DO criteria. If EPA formulates a specific follow-up proposed action to its prior approval of the revised DO criteria, then that new action would be subject to consultation and should be submitted to the Service prior to implementation, as according to the provisions of Section 7 of the ESA. The Service is available to provide species-specific information that may assist you.

Please contact Mr. David Oster of this office at 337/291-3121 to cooperate in ESA technical assistance on your June 3, 2016, approval of the amendments to Louisiana’s water quality standards or to initiate Section 7 consultation on future actions related to the revised DO criteria. Please contact me directly at 337/291-3113 for questions regarding this letter. We look forward to working with your agency on the conservation of listed species.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph A. Ranson", with a stylized flourish at the end.

Joseph A. Ranson  
Field Supervisor  
Louisiana Ecological Services Office

cc:

LDWF, Natural Heritage Program, Baton Rouge, LA

Louisiana Department of Environmental Quality, Baton Rouge, LA